IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.610 of 1993

1. Pattumani
2. Selladurai
3. Arumugam
4. Mariappan
5. Manoranjithammal
6. Gandhimathi
7. Santha
8. Anjammal .. Appellants

-Vs-

1. Uthrambal
2. Rukmani Ammal
3. Guruchandran .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree dated 25.4.1990 and made in A.S.No.16 of 1989 on the file of the Subordinate Judge of Chidambaram, reversing the judgment and decree dated 6.7.1989 and made in O.S. No.104 of 1981 on the file of the District Munsif, Chidambaram.

!For Appellants : Mr.N.Sankaravadivel

^For Respondents : Mr.Srinath Sridevan

:JUDGMENT

Aggrieved over the judgment of the learned Subordinate Judge, Chidambaram, granting a preliminary decree in a suit for partition by reversing the judgment of the trial Court, the defendants 2 to 5 and 7 to 10 have brought forth this second appeal.

2. The short facts necessary for the disposal of this appeal are as follows:

One Pethu Asari had three sons namely Muthukumara Asari, Dhandayutha Asari and Palanidurai Asari. The first plaintiff is the wife of Dhandayutha Asari. Pethu Asari died in the year 1945 leaving behind him his three sons as his heirs, and he left the house property at Door No.16-A, Mariyamman Koil Street, Chidambaram. Muthukumara Asari died in the year 1980 leaving behind his wife, the first defendant and his sons defendants 2 to 6 as his heirs. Dhandayutha Asari died in the year 1956 leaving behind him his wife, the first

plaintiff and his daughters plaintiffs 2 and 3 as his heirs. Palanidurai Asari died in the year 1965 leaving behind his wife the 7th defendant as his heir. After the death of their father Pethu Asari, the three sons are entitled to 1/3rd share each in the said house property. As such, the plaintiffs are entitled to 1/3rd share each in the suit property. Now the defendants are trying to dispossess the plaintiffs. During the pendency of the suit, the first plaintiff died, and the plaintiffs 2 and 3 are recognised as the heirs of the first plaintiff. The first defendant also died, and her legal representatives are the defendants 2 to 10. The said three sons sold their rights to their father Pethu Asari; that Pethu Asari became the absolute owner of the suit property. The first plaintiff's husband Dhandayutha Asari purchased from his father Pethu Asari on 26.3.1945, the southern portion of the property. The northern portion was with his father, and he died in the year 1945. Dhandayutha Asari died in the year 1956 leaving behind the plaintiffs as heirs, and thus, the plaintiffs have become entitled to 1/3rd share. Hence, this suit.

3. The suit was resisted by the defendants stating that neither the plaintiffs nor the deceased Dhandayutha Asari had any rights over the property; that the property exclusively belonged to Muthukumara Asari and Palanidurai Asari; that they were in possession and enjoyment of the same by paying tax; that they prescribed title also; that the deceased Dhandayutha Asari did not have any right over the property on the date of his death, and consequently, the plaintiffs will not also get any right; that the defendants and their predecessors alone dealt with the property; that the suit property is a dwelling house, wholly occupied by the defendants; that the suit is also hit by Sec.23 of the Hindu Succession Act, and hence, the suit was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and dismissed the same. The aggrieved plaintiffs 2 and 3 took it on appeal, wherein the judgment of the trial Court was reversed by the first appellate forum, and a preliminary decree was granted in favour of the plaintiffs, which is the subject matter under challenge in this second appeal.

5. At the time of admission, the following substantial question of law was formulated by this Court:

"Whether the decision of the lower appellate Court that Section 23 of the Hindu Succession Act is not applicable is correct?"

6. This Court heard the learned Counsel for the appellants and also the learned Counsel for the respondents on those contentions.

7. This second appeal rests on the interpretation of Sec.23 of the Hindu Succession Act. Inter alia in their defence, the defendants contended before the Courts below that the suit property was a dwelling house; that the other co-parceners were actually dwelling therein; that there was no intention on their part of making a division or any alienation; that the plaintiffs cannot now ask for a division, and thus the suit was not maintainable in view of the provisions under Sec.23 of the Act. The said contention was negatived by the first appellate Court and rightly too. It is not in controversy that the property originally belonged to one Pethu Asari, who died in the year 1945, leaving behind him three sons namely Dhandayutha Asari, Muthukumara Asari and Palanidurai Asari as his heirs. It is also not in dispute that those three sons died in the year 1956, 1980 and 1965 respectively. The first plaintiff is the wife of Dhandayutha Asari, and the plaintiffs 2 and 3 are the

daughters of Dhandayutha Asari and his wife, the first plaintiff.
8. Attractive though the contention of the appellants' side may be, it cannot stand the scrutiny of law. It is not a case, where Sec.23 of the Act can have any application at all. Here is a suit for partition by the wife and daughters of one of the coparceners, who actually got into the shoes of the said coparceners. It is pertinent to point out that the said Dhandayutha Asari did not leave any male issues, who alone can have an objection, if a suit for partition was filed in respect of the residential house, as contemplated under Sec.23 of the Act. But, in the instant case, Dhandayutha Asari died intestate leaving behind his wife Marimuthammal the first plaintiff and his two daughters plaintiffs 2 and 3 as his heirs. The learned Counsel for the respondents in support of his contention that Sec.23 of the Act has no application to the present facts of the case, relied on a decision of the Allahabad High Court, reported in 1968 A.L.J. 3 (SAVITRI DEVI V. GAURI SHANKER AND OTHERS), wherein it has been held that Sec.23 of the Hindu Succession Act did not apply and the partition suit by the daughters was maintainable. This Court is of the considered view that the view taken by that Court is squarely applicable to the present facts of the case. It remains to be stated that in a case, where a Hindu intestate has left surviving him both male and female heirs, specified in Clause I of the Schedule and his property includes a dwelling house, wholly occupied by the members of the family, then notwithstanding what is contained in the Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but, the female heir shall be entitled to right of residence therein. In the instant case, the said Dhandayutha Asari left surviving him, his wife and two daughters, and he has not left any male heir. In such circumstances, the objection now raised by the defendants, who are the heirs through the other branches, cannot be countenanced in law. Hence, this Court is unable to see any substance in the contentions put forth by the appellants' side. There is nothing to interfere in the judgment of the first appellate Court.
9. In the result, this second appeal is dismissed, confirming the judgment and decree of the first appellate Court and leaving the parties to bear their costs.

Index: yes
Internet: yes

To:

1. The Subordinate Judge
Chidambaram
2. The District Munsif
Chidambaram
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/

□